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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DENNIS FRYMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARYANN C. HAYES
Counsel of Record
PHELAN, POPE & JOHN, LTD.
180 North Wacker Drive
Suite 500
Chicago, Illinois 60606
(312) 621-0700

Attorney for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

If the negligent operation by the defendant, the United States of America, of a federal lake and park as a recreational facility causes personal injuries, and such negligence is unrelated to the operation of the area as a flood control project, is the bar to recovery of compensation for personal injuries stated in 33 U.S.C. § 702c (1980) inapplicable?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
1. Nature of the Case	2
2. The District Court Ruling	5
3. The Seventh Circuit Decision	5
REASONS WHY THE PETITION SHOULD BE ALLOWED	7
I. Courts of appeals disagree over the breadth of § 702c immunity, therefore impairing the uniform administration of the FTCA	7
II. The decision below is contrary to the Court's decision in *James* which recognized limits to the application of § 702c immunity	10
III. The decision of the Seventh Circuit undermines the rationale of the FTCA and of § 702c immunity as described in *James*, and is fundamentally unjust	15
CONCLUSION	17

APPENDIX:

Opinion of the Court of Appeals, April 26, 1990 .. A-1
Order of the District Court, December 30, 1988 .. A-9
33 U.S.C. § 702c (1980) A-13

TABLE OF AUTHORITIES

CASES: PAGE

Bell v. Hood, 327 U.S. 678 (1945) 6
Boyd v. United States, 881 F.2d 895 (10th Cir. 1989) 7-9, 13-15
Clay v. United States, 647 F. Supp. 110 (S.D. Miss. 1986) 14
Dawson v. United States, 894 F.2d 70 (3d Cir. 1990) 7, 10, 13
Davis v. United States, 716 F.2d 418 (7th Cir. 1983) 16
Denham v. United States, 646 F. Supp. 1021 (W.D. Tex. 1986), *aff'd*, 834 F.2d 518 (5th Cir. 1987) . 14-16
Dewitt Bank & Trust Co. v. United States, 878 F.2d 246 (8th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1318 (1990) 7, 10
Eaton v. Dorchester Development, Inc., 692 F.2d 727 (11th Cir. 1982) 6
Feres v. United States, 340 U.S. 135 (1950) 15
Hayes v. United States, 585 F.2d 701 (4th Cir. 1978) 7, 8, 10-14

McCarthy v. United States, 850 F.2d 558 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1318 (1989) 7, 9, 10, 15

Miller v. United States, 442 F. Supp. 555 (N.D. Ill. 1976), *aff'd*, 597 F.2d 614 (7th Cir. 1979) ... 16

Mocklin v. Orleans Levee District, 877 F.2d 427 (5th Cir. 1989) 7

Morici Corp. v. United States, 681 F.2d 645 (9th Cir. 1982) 7, 9-14

Peterson v. United States, 367 F.2d 271 (9th Cir. 1966) 11

Pueblo de Cochiti v. United States, 647 F. Supp. 538 (D.N.M. 1986) 13, 14

Rehak v. United States, 1989 U.S. Dist. LEXIS 11780 (N.D.N.Y. Sept. 25, 1989) 13, 14

Stephens v. United States, 472 F. Supp. 998 (C.D. Ill. 1979) 3

United States v. James, 478 U.S. 597 (1986) ... . *passim*

STATUTES AND RULES:

28 U.S.C. § 1254(1) (1988) 2

28 U.S.C. § 2671 (1990) 2

28 U.S.C. § 2680(a) (1990) 2, 5

28 U.S.C. § 1346(b) (1988) 2

33 U.S.C. § 702c (1980) ..... *passim*

Fed. R. Civ. P. 12(b)(1), (6) 6, 14

Ill. Rev. Stat. ch. 70, ¶ 33 (1985) 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dennis Fryman petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on April 26, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 901 F.2d 79 (1990), and is reprinted in the appendix, *infra* p. A-1.

The memorandum decision of the United States District Court for the Central District of Illinois, No. 86-2075 (Dec. 30, 1988), is unreported. It is reprinted in the appendix, *infra* p. A-9.

JURISDICTIONAL STATEMENT

The Seventh Circuit entered its final judgment on April 26, 1990. The Court has jurisdiction to review this matter under 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

The statute involved is 33 U.S.C. § 702c (1980), the pertinent part of which is reprinted in the appendix, *infra* p. A-13:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods on or flood waters at any place . . . .

STATEMENT OF THE CASE

Nature of the Case

On August 7, 1983, petitioner, Dennis Fryman, was rendered a quadriplegic as the result of a diving accident which occurred offshore of an island located near the Wilborn Creek Recreational Area at Lake Shelbyville, Illinois. The complaint, brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, and 2680(a) (1990), seeks damages for the negligent and wilful and wanton operation of recreational areas owned and maintained by the government.

The Shelbyville Dam and Reservoir Project consists of property and waterways owned, maintained, and controlled by the United States. The government intended for the project to provide flood control, improved water supply and pollution abatement, as well as minimum pools for recreational use and for the conservation of fish and wildlife. *Stephens v. United States*, 472 F. Supp. 998, 1002 (C.D. Ill. 1979).[1] An average of 2,762,000 people a year visited Lake Shelbyville from 1978 through 1982, including 50,000 visitors per day on peak weekends. The United States Army Corps of Engineers has developed eleven public recreation areas, totalling 2,557 acres at Lake Shelbyville, including the Wilborn Creek Recreational Area ("Wilborn Creek") where the subject accident occurred.

The United States developed Wilborn Creek for recreational use, providing picnic tables, a groomed beach, a boat launch ramp, campsites, playground equipment, drinking fountains, a bathhouse, and a fish cleaning station. The defendant also permitted swimming and diving at the Wilborn Creek beach, as well as at the island near Wilborn Creek where petitioner was injured. The government did not post signs prohibiting or warning against swimming or diving at the island.

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[1] The plaintiff in *Stephens* suffered quadriplegia after a dive into Lake Shelbyville. The court held that the government negligently and wilfully and wantonly failed to post signs warning of underwater hazards. Subsequently, the United States Army Corps of Engineers erected 24 signs around Lake Shelbyville that stated:

> ***CAUTION*: THIS LAKE CONTAINS TREE STUMPS, BOULDERS AND OTHER DEBRIS. SWIMMING SHOULD BE RESTRICTED TO DESIGNATED BEACHES.**

The Corps of Engineers, however, did not post signs at the island where petitioner's injury occurred until the day after Fryman was injured.

On Sunday, August 7, 1983, petitioner and his brother went to Lake Shelbyville to fish, later beaching their boat on a small island near Wilborn Creek. Petitioner entered the water and made a shallow racing dive five to ten feet offshore, where the water was over his knees. His head struck a concealed hazard or the bottom of the lake, which caused a fracture of his C-5 vertebra. The accident resulted in quadriplegia, completely paralyzing petitioner from his neck down.

On March 10, 1986, petitioner filed a complaint sounding in negligence for damages under the Federal Tort Claims Act ("FTCA"). On July 18, 1988, the complaint was amended to add a count of wilful, wanton and malicious misconduct. Count I of the amended complaint alleged that the United States Army Corps of Engineers managed and controlled the swimming area where the injury occurred, and that at this location it negligently failed to: (1) prohibit diving and swimming; (2) warn the public of hazards; (3) remove hazardous underwater obstacles; and (4) provide supervision.

Count II of the amended complaint, incorporating the allegations of Count I, further alleged that the wilful, wanton and malicious acts or omissions by the defendant proximately caused petitioner's injuries. None of the allegations of either count related to the operation of Lake Shelbyville as a flood control facility. Instead, these allegations related solely to the operation of Wilborn Creek and adjoining areas of Lake Shelbyville as a recreational facility.

On September 30, 1988, the defendant filed a motion to dismiss, or, alternatively, for summary judgment, contending that an immunity provision of the Flood Control Act of 1928, 33 U.S.C. § 702c (1980), relating to damage

"from or by floods or flood waters," applied to this action. Defendant also asserted in its Motion to Dismiss that the action was barred by 28 U.S.C. § 2680(a) (1990), the discretionary act immunity.[2]

The District Court Ruling

On December 30, 1988, the United States District Court for the Central District of Illinois dismissed the action for lack of subject matter jurisdiction on the sole ground that the government was immune under § 702c. Relying on *United States v. James*, 478 U.S. 597 (1986), the district court concluded that since Lake Shelbyville was part of a flood control project, the defendant was automatically immune from liability under § 702c regardless of whether the injury was actually caused by flood waters. The district court's order did not address petitioner's argument that his injuries related solely to the *recreational* operation of the facility and were completely unrelated to flood control operations.

The Seventh Circuit Decision

Petitioner timely filed a notice of appeal on January 13, 1989. In an opinion issued on April 26, 1990, the Seventh Circuit affirmed the district court decision. The Seventh Circuit noted that the decision in *United States v. James*, 478 U.S. 597 (1986) has left confusion in its wake as to the limits of § 702c immunity where injuries are unrelated to the operation of a flood control facility. The court ob-

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[2] Defendant also filed a motion for summary judgment, or, alternatively, a motion to dismiss, based on the applicability of the Illinois Recreational Use of Land and Water Areas Act, Ill. Rev. Stat. ch. 70, ¶ 33 (1985). However, the district court dismissed the action solely on the basis of § 702c immunity.

served that *James* was "*so* broadly written" that it could not be applied literally, since a literal application would in effect result in a "but for" test which would always result in a finding of § 702c immunity, *i.e.*, "but for the project, there would be no water, and but for the water no one would swim and drown." Slip op., *infra* pp. A-5, A-6, A-7, (emphasis in original).

The Seventh Circuit reasoned, however, that if there are limits to § 702c immunity, they must relate to causation. Accordingly, the court concluded that flood control activities at Lake Shelbyville—namely, seasonal changes in water level[3]—had increased the probability of injury to petitioner. The Seventh Circuit then affirmed on narrow grounds, stating:

> We do not decide whether a recreational injury on a flood-control lake could be actionable under the FTCA when the flood-control activities did not increase the probability of the injury compared with a natural lake devoted to recreational use. Resolution of that question must wait until the answer makes a difference.

Slip op., *infra* p. A-8.

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[3] The Seventh Circuit's reliance on this fact violated the strict standard for Fed. R. Civ. P. 12(b)(1) dismissals enunciated in *Bell v. Hood*, 327 U.S. 678, 682 (1945). The district court's decision was based on a facial review of the complaint and the finding that Lake Shelbyville was part of a federal flood control project. Slip op., *infra* p. A-10. The Seventh Circuit, therefore, should have restricted its review to whether the complaint sufficiently alleged jurisdiction, assuming that all of the allegations in the complaint were true. *See Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 732 (11th Cir. 1982).

REASONS WHY THE PETITION SHOULD BE ALLOWED

I.

Courts of appeals disagree over the breadth of § 702c immunity, therefore impairing the uniform administration of the FTCA.

Fortuities of venue now determine whether a plaintiff will be given an opportunity to recover for injuries sustained during the recreational use of multi-purpose facilities associated with a flood control project. In the Fourth and Tenth Circuits, a plaintiff would prevail on this question. *See Hayes v. United States*, 585 F.2d 101 (4th Cir. 1978); *Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989). Conversely, the Third, Eighth, and Ninth Circuits, which sweepingly apply § 702c's immunity provision, would deny an injured party relief. *See, e.g., Dawson v. United States*, 894 F.2d 70 (3d Cir. 1990); *Dewitt Bank & Trust Co. v. United States*, 878 F.2d 246 (8th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1318 (1990); *McCarthy v. United States*, 850 F.2d 558 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1312 (1989) (citing *Morici Corp. v. United States*, 681 F.2d 645 (9th Cir. 1982)). *See also Mocklin v. Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) (total governmental immunity barred recovery for drowning at federal flood control project even if injury unrelated to increased water level).

Petitioner contends that the government is not immune because his injuries arose from the operation of Lake Shelbyville as a recreational facility, unrelated to its operation as a flood control facility. The Fourth Circuit endorsed this approach in *Hayes v. United States*, 585 F.2d 101 (4th Cir. 1978), rejecting the government's assertion of immunity. There, the plaintiff sought damages for

erosion and flooding of his farm allegedly caused by the operation of the dam's flood gates. The plaintiff alleged that this "dual purpose" dam was designed both to operate as a flood control facility and to provide recreation for the public. *Id.* at 702. Since it was not clear to the court for what purpose the flood gates were in operation at the time of the plaintiff's injury, the court applied a functional analysis, holding that dismissal of the case had been premature and improper:

> If the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility *without relation* to the operation of the dam as a flood control project, he would avoid the absolute bar of Section 702c.

Id. at 702-03 (emphasis added).

The Tenth Circuit recently adopted the Fourth Circuit's functional test in *Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989), holding that § 702c did not bar suit by a plaintiff struck and killed by a boat while swimming in a flood control lake. The court recognized that *United States v. James*, 478 U.S. 597 (1986) contained broad language regarding § 702c immunity, but also noted that the Court appeared to distinguish cases where injury resulted from waters not actively being used for flood control purposes. Although appreciating the difficulty of drawing these distinctions in some cases, the Tenth Circuit did not believe that this difficulty justified a blanket application of immunity in all cases. 881 F.2d at 900 n.6. Accordingly, the court held that § 702c immunity should shield the government only when injury results from *flood control* operations, not when injury results from the *recreational* operations of a flood control project. *Id.* The Tenth Circuit simply could not agree "that Congress intended to stretch the shield of flood control immunity to the limits contemplated by the 'wholly unrelated' standard." *Id.*

The "wholly unrelated" standard to which the Tenth Circuit referred was applied in *Morici Corp. v. United States*, 681 F.2d 645 (9th Cir. 1982), where the Ninth Circuit considered a claim for crop damage allegedly caused by underground seepage from a negligently operated dam. Like the dam in *Hayes*, the dam in *Morici* served the dual purpose of flood control and recreation. The plaintiff alleged that the damage occurred while the government operated the dam for recreational purposes. Nevertheless, the court held that "[e]ven if the project was being operated at the time of the negligence for a purpose other than flood control, the operation that caused the damage was not 'wholly unrelated' to a Congressionally authorized flood control project." *Id.* at 648.

Not surprisingly, in *McCarthy v. United States*, 850 F.2d 558 (9th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S. Ct. 1312 (1989), the Ninth Circuit followed its earlier *Morici* opinion. While acknowledging that the plaintiff's diving injury "[d]id not result from a perceptibly active operation of the flood control facility," the *McCarthy* court rejected the argument that his injuries related solely to the recreational operation of flood control facilities. *Id.* at 567. The court declined to distinguish between the active and passive flood control operations, noting the difficulty of discerning passive conditions which are "invariably the result of other active forces which have gone before." *Id.* at 561. *But see Boyd*, 881 F.2d at 900 n.6 ("[W]hile such a distinction may be difficult in some cases, this does not justify a grant of blanket immunity for all cases . . . ."). The court refused to consider the purpose of the defendant's conduct as determinative:

> So long as a project is authorized by Congress for flood control purposes, and the damage or injury is related to the use of that project, immunity continues to attach.

850 F.2d at 562 (citing *Morici*, 681 F.2d at 648). Therefore, the Ninth Circuit held that the government was immune "[e]ven if the project was being operated at the time of the negligence for a purpose other than flood control." *Id.* at 563.[4]

The decision of the Seventh Circuit below further muddied the waters of § 702c interpretation because it endorsed neither the *Hayes* nor the *McCarthy* approach. The court, in fact, commented that other circuits may be "jumping the gun" by holding that *Morici*'s "wholly unrelated" language constituted " 'the test'." Slip op., *infra* p. A-7. Rather, the Seventh Circuit admittedly "toed the line" between each approach, and interjected its own vague "probability" test—"Flood-control activities increase the probability of injuries such as Fryman's." *Id.* The Seventh Circuit's novel approach underscores the need for guidance due to the split in authority in the circuits and the lack of a definitive ruling by the Court.

II.

The decision below is contrary to the Court's decision in *James* which recognized limits to the application of § 702c immunity.

In *United States v. James*, 478 U.S. 597 (1986), the Court determined that § 702c immunity applied to cases involving flood control activities. There, in two separate occurrences, recreational users of reservoirs located upon

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[4] The Third and Eighth Circuits have adopted *McCarthy*'s mechanical application of § 702c's immunity provision and rejected the functional rule of *Hayes*. *See Dawson v. United States*, 894 F.2d 70 (3rd Cir. 1990); *Dewitt Bank & Trust Co. v. United States*, 878 F.2d 246 (8th Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S. Ct. 1318 (1990).

federal flood control projects sustained injury *while the facilities were actively involved in flood control activities.* In each accident, the release of water for flood control purposes "created a swift, strong current" that pulled the plaintiffs through enormous underwater portals called "tainter gates." *Id.* at 599. As the Court observed, the injuries resulted from the intentional release of waters from reservoirs that had reached flood stage. "*As part of the flood control function* of the . . . facility, the Corps of Engineers began to release water through the tainter gates." *Id.* (emphasis added).

In *James*, therefore, the Court did not consider whether the government is immune from liability for negligence occurring as a result of the *recreational* operation of a facility not involving flood control operations. The Court did, however, refer to the important distinction between recreational and flood control operations. After observing that the injuries in *James* were caused by "flood waters" as that term is defined in § 702c, the Court commented in footnote 7:

> See *Morici Corp. v. United States*, 681 F.2d, at 647-648 (no immunity for flooding if innundation [sic] "wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization"), quoting *Peterson v. United States*, 367 F.2d 271 (CA9 1966); *Hayes v. United States*, 585 F.2d 701, 702-703 (CA4 1978) ("If the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility *without relation to the operation of the dam as a flood control project*, he would avoid the absolute bar of Section 702c" (emphasis added [by the Court])).
>
> We have noted that here the District Courts in each case found that the waters were being released

> from federal flood control facilities to prevent flooding. . . . The Court of Appeals upheld these findings, 760 F.2d, at 603, and assumed that "the waters in this [consolidated] case were floodwaters."

Id. at 605 n.7. Significantly, the Fourth Circuit in *Hayes* resolved this identical issue in favor of the claimant, rejecting the government's assertion of immunity. Again, the facility in *Hayes* was a "dual purpose" dam designed to provide recreation for the public as well as flood control. 585 F.2d at 702.

Thus, the Court in *James* determined that § 702c immunity is broad and far-reaching in cases involving flood control activities. However, in footnote 7, the Court delineated two *limits* to § 702c immunity: (1) cases where flood damage is wholly unrelated to a flood control project, *i.e.*, *Morici*; and (2) cases to which the *Hayes* standard applies—that is, where damage occurs as a result of a facility's operation as a recreational facility without relation to its operation as a flood control project.

Confusion has arisen from the discussion in *James* where the Court again noted that the release of waters was clearly related to flood control. 478 U.S. at 605. The Court continued by stating that it rejected the claimants' alternative argument that the government was not entitled to immunity because their injuries arose from the alleged mismanagement of recreational activities wholly unrelated to flood control. However, since the government's activities in *James* were so clearly related to flood control, the Court did not discuss the possible inconsistency between footnote 7 and this later dictum.

Furthermore, several courts have noted that the language of footnote 7 creates confusion of its own since the results of *Hayes* and *Morici* are substantively contradic-

tory. *See, e.g., Fryman*, No. 89-1139, slip op., *infra* pp. A-6, A-7; *Dawson v. United States*, 894 F.2d 70, 73 (3d Cir. 1990); *Pueblo de Cochiti v. United States*, 647 F.2d 538, 541 (D.N.M. 1986). The Seventh Circuit asserted below that "*James* did not adopt the 'wholly unrelated' language from *Morici*; it only quoted it in a footnote." Slip op., *infra* p. A-7. Indeed, Judge Easterbrook concluded that "[i]t is unlikely that the Justices read these cases, and citing inconsistent holdings does not endorse either." Slip op., *infra* p. A-6.

The Seventh Circuit's glib dismissal of the *James* footnote is in error. By quoting only that part of *Morici* which did not conflict with *Hayes*, the Court deftly avoided specifically disapproving the Ninth Circuit's rationale. On the other hand, by specifically highlighting the *Hayes* "*without relation*" language, the Court recognized that § 702c is inapplicable where a plaintiff can prove damage as a result of the operation of a flood control project as a recreational facility without relation to its operation as a flood control project. *See Rehak v. United States*, 1989 U.S. Dist. LEXIS 11780 (N.D.N.Y. Sept. 25, 1989).

Accordingly, several post-*James* courts have properly applied this second category of limitation, the *Hayes* standard, in cases where the alleged act or omission related to the operation of a reservoir as a recreational facility. In *Boyd*, the Tenth Circuit specifically relied upon the fact that the Court in *James* had cited and underscored the *Hayes* "without relation" language. 881 F.2d at 900. The Tenth Circuit rejected the "but for" test of causation that comes part and parcel of the "wholly unrelated" standard, stressing that the *Hayes* rationale coincides with the commonsense notion that Congress must have intended that there be *some* limits to § 702c immunity. *Id.* Thus, the court concluded that Congress must have intended to

shield the government from only that liability *associated* with flood control, not liability associated with operating a recreational facility. *Id.*

Likewise drawing upon the Court's favorable citation of *Hayes* in *James*, several district courts have held that § 702c does not bar recovery for injuries unconnected with the operation of a flood control facility as a flood control project. *See, e.g., Denham v. United States*, 646 F. Supp. 1021 (W.D. Tex. 1986), *aff'd*, 834 F.2d 518 (5th Cir. 1987) (§ 702c immunity issue not raised on appeal where diving accident resulted in quadriplegia); *Clay v. United States*, 647 F. Supp. 110, 111 (S.D. Miss. 1986) ("§ 702c does not apply if the act which caused flooding was done for a purpose other than flood control, even if the act was incidental to a flood control project.").[5] For instance, in *Denham* the court premised its holding of no immunity on the finding that the signs at issue warning swimmers of hidden dangers were unrelated to flood control operations. 646 F. Supp. at 1025. That is, while *James* involved injuries caused "by floods or flood waters," these cases did not.

The *James* case, then, involved the sudden release of flood waters and thus presented facts under which both *Morici* and *Hayes* would dictate a similar result—a finding of immunity for the government. The Court's endorsement of *Hayes* in *James*, however, is inconsistent with the finding made by the Seventh Circuit below, since peti-

[5] *See also Rehak v. United States*, 1989 U.S. Dist. LEXIS 11780 (N.D.N.Y. Sept. 25, 1989) (endorsing *Hayes* "without relation" language although *James* controlled factually); *Pueblo de Cochiti v. United States*, 647 F. Supp. 538, 542 (D.N.M. 1986) (crop damage) ("Although the Supreme Court was somewhat ambivalent in *James* about limiting immunity under Section 702c their ambivalence is, by itself, reason to deny Defendants' [12(b)(6)] motion . . . .")

tioner has alleged injury associated only with the operation of a flood control project as a recreational facility, without relation to flood control operations. Decisions like *McCarthy* can be viewed as resulting from a stubborn adherence by the Ninth Circuit to its pre-*James* standard without considering the Court's careful use of language in *James* at footnote 7. Well-reasoned, post-*James* decisions like *Boyd* have recognized the logic of the functional analysis employed by the Fourth Circuit in determining the limits of § 702c immunity.

III.

The decision of the Seventh Circuit undermines the rationale of the FTCA and of § 702c immunity as described in *James*, and is fundamentally unjust.

In *Feres v. United States*, 340 U.S. 135, 139 (1950), the Court noted that the FTCA represents "the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." Conversely, the Court stated in *United States v. James*:

> [T]he broad principle applicable here is that a "clear relinquishment of sovereign immunity [is required] to give justification for tort actions."

478 U.S. 597, 610 (1986). The Court in *James* also stated:

> Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the government from "any" liability associated with flood control.

Id. at 608. Consistent with the intentions of Congress and the teachings in *Feres* and *James*, governmental immunity should extend to cases which involve "any liability associated with flood control," but no further. As the court in *Denham* stated, "if a Plaintiff alleges and proves an injury unconnected with the operation of a facility as a flood

control project . . . [t]he cause of a plaintiff's injury should be reviewed on a case by case basis to determine the relationship of the injury to the control, retention, and/or release of flood waters." 646 F. Supp. at 1027.

Assessing liability for negligence in the maintenance and supervision of swimming areas which the government knows to be used by the public, or for negligence in the protection of the public using such areas, simply has no relationship to "liability associated with flood control." In these situations, injuries occur only coincidentally within the confines of a flood control project. For instance, in petitioner's case, the island where the accident occurred could just as well have been located within a national park or wildlife refuge.[6] There is no indication that Congress intended the confines of federal flood control projects to be "immune lands." Instead, as the Court recognized in *James*, Congress intended that the government would be immunized from any liability *associated with* flood control. 478 U.S. at 608.

Justice Stevens' dissent in *James* correctly describes the illogic of a construction of § 702c that would provide immunity to the government for any negligence if flood control activity occurs anywhere on the premises:

> It defies belief—and ascribes to the Members of Congress a perverse, even barbaric, intent—to think that they spent days debating the measure of extra constitutional compensation they would provide riparian

[6] *See Davis v. United States*, 716 F.2d 418 (7th Cir. 1983) (affirming judgment in favor of plaintiff rendered quadriplegic from diving injuries in national wildlife refuges owned and operated by the United States, based on the government's negligence or wilful and wanton misconduct in failing to post warnings regarding swimming and diving); *Miller v. United States*, 442 F. Supp. 555 (N.D. Ill. 1976), *aff'd*, 597 F.2d 614 (7th Cir. 1979) (same).

> landowners but intended—without a single word of dissent—to condemn the widows, orphans, and injured victims of negligent operation of flood control projects to an irrational exclusion from the protection of the subsequently enacted Tort Claims Act.

Id. at 620. This language applies with added force in the present case where the governmental activity that led to petitioner's catastrophic injuries had absolutely nothing to do with flood control, and no flood control activity occurred or was authorized to occur at or near the premises at the time of petitioner's accident.

Accordingly, immunity should not apply to a claim based on a functional activity unrelated to the operation of the facility as a flood control project. This analysis is consistent with the recognition that § 702c immunity serves the important, *but specific*, purpose of granting the government broad immunity for activities related to flood control. At the same time, permitting recovery for injuries *unrelated* to flood control activities does not infringe upon the purpose for immunity.

CONCLUSION

This case presents an issue ripe for consideration by the Court. There is a division within the courts of appeals concerning the breadth of § 702c's immunity provision. In this case, the Seventh Circuit has employed a novel interpretation of § 702c, rejecting in the process already conflicting standards applied in cases from other circuits. Persons suffering catastrophic injury as a result of alleged governmental negligence are entitled to a resolution of

their rights based upon a uniform and consistent application of law enunciated by the Court, rather than fortuities of venue. For these reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

MARYANN C. HAYES
Counsel of Record
PHELAN, POPE & JOHN, LTD.
180 North Wacker Drive
Suite 500
Chicago, Illinois 60606
(312) 621-0700

Attorney for Petitioner

DATED: July 20, 1990

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-1139

DENNIS FRYMAN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

901 F.2d 79

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 86-2075—**Harold A. Baker**, *Chief Judge.*

ARGUED FEBRUARY 21, 1990—DECIDED April 26, 1990

Before POSNER and EASTERBROOK, *Circuit Judges*, and MOODY, *District Judge.**

* Honorable James T. Moody, of the Northern District of Indiana, sitting by designation.

EASTERBROOK, *Circuit Judge*. A nasty flood of the Mississippi River in 1927 led to the Flood Control Act of 1928. Congress authorized a complex system of dams and diversionary channels to reduce the damage high water produces. Any system of flood control shifts the incidence of loss even if it substantially reduces the net damage. People upstream of the dams will be inundated although safe before; people downstream face spectacular loss if a dam fails or the floodgates must be opened at an inopportune time. These persons, new victims of floods at the same time flood-control programs rescue others, may be expected to complain. One part of the package in 1928, 33 U.S.C. §702c, closes courthouse doors to them. It provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place".

Although §702c eliminates any remedies the courts might otherwise provide (in 1928 there were none, given sovereign immunity), Congress regularly enacts special legislation offering succor to victims of floods, whether or not the injuries were caused or augmented by federal flood-control works. Assistance in the billions of dollars has become routine. People living in flood plains must count the exchange a gain. Judicial relief would take much longer and would not match the generosity Congress has displayed. Section 702c now plays a role no one could have anticipated in 1928. After the Federal Tort Claims Act of 1946 waived a big chunk of sovereign immunity, §702c became an important defense. It matters in a class of cases for which Congress does not enact special legislation: boating accidents on the lakes impounded by flood-control dams, drownings, and in this case a diving accident that rendered a teenager quadriplegic.

Dennis Fryman and his brother Terry went swimming on August 7, 1983, near an island in Lake Shelbyville in Illinois. The lake was created between 1963 and 1970 as part of a flood-control project, and like many other artificial bodies of water was put to recreational use. The Army Corps of Engineers, which runs the flood-control operations, established the Wilborn Creek Recreational Area along the lake. People use the area for boating, water skiing, swimming, fishing, and picnicking. The island Fryman visited is submerged when the water level in the lake is high, but when it appears it is a popular site for picnics. Fryman attempted a shallow, racing dive into the water off the island; his head struck a concealed hazard, which broke his neck and left him paralyzed. The complaint (the only source of facts in the case) does not reveal what kind of object Fryman struck or whether he looked before leaping. Fryman's administrative claim under the Tort Claims Act was rejected; his suit contends that the Corps of Engineers acted not only negligently but also maliciously in not posting warning signs or closing the island to recreation. The district court dismissed the suit under Fed. R. Civ. P. 12(b)(1), holding that in light of §702c there is no federal jurisdiction (because the United States has not waived its sovereign immunity).

Section 702c is written broadly in the sense that it covers "any" damage, but it might have been possible to understand the scope of the statute—"floods or flood waters"—as referring only to the escape or overflowing of water. Recreational injuries within flood-control projects then would be covered by the Tort Claims Act rather than §702c. *United States v. James*, 478 U.S. 597 (1986), considers and rejects this possibility. Boaters were swept to their deaths when waters within a flood-control and recreation project were released. The Court concluded

that §702c applies to such injuries, because it is broadly written. It read the critical phrase, "floods or flood waters", broadly indeed, 478 U.S. at 605:

> The Act concerns flood control projects designed to carry floodwaters. It is thus clear from §702c's plain language that the terms "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.

Accordingly, every drop of water in Lake Shelbyville is "flood water" within the meaning of §702c, and the statute blocks recovery if the injury is "damage from or by" these waters.

Fryman says that the injury was inflicted by a combination of the hidden object and the Corps of Engineers' failure to warn him off. Water, Fryman insists, has nothing to do with his paralysis. By contrast, the water in *James* was the culpable actor, seizing the boat and dragging the passengers under. Attributing motives and deeds to water is not a way around *James*. In both cases the responsible actors were federal employees, and the negligence (if any) lay in not taking precautions. Water played some role in both—in *James* creating the fatal current, in this case concealing the obstacle and creating the motive for the dive. The government could have kept boats off the lakes involved in *James*, or it could have kept boaters farther back from the sluices; decisions concerning the recreational use of the lakes led to the deaths, just as (Fryman contends) decisions concerning the recreational aspects of Lake Shelbyville led to his injury.

Recharacterizing causes as Fryman proposes would enable parties to avoid *James* by playing word games. It was not a pleading defect that led the plaintiffs to lose

James; it was the fact that the deaths occurred as a result of a risk of running a flood-control project. The Court rejected both the argument that injuries from the recreational components of a flood-control project are outside §702c, 478 U.S. at 609-10, and a contention that losses attributable to failure to warn of hazards are not covered, *id.* at 610-12. The Court described §702c as barring " 'any' liability associated with flood control", 478 U.S. at 608, and any liability arising out of the " 'management' of a flood control project", *id.* at 610. The Court found it hard to conceive how §702c could have been more broadly written; we find it hard to conceive how a decision interpreting this statute could have been more broadly written.

James was *so* broadly written that it cannot be applied literally. The "management of a flood control project" includes building roads to reach the beaches and hiring staff to run the project. If the Corps of Engineers should allow a walrus-sized pothole to swallow tourists' cars on the way to the beach, or if a tree-trimmer's car should careen through some picnickers, these injuries would be "associated with" flood control. They would occur within the boundaries of the project, and but for the effort to curtail flooding the injuries would not have happened. Yet they would have nothing to do with management of flood waters, and it is hard to conceive that they are "damage from or by floods or flood waters" within the scope of §702c. See also *James*, 478 U.S. at 605 n.7, implying that §702c is irrelevant to some injuries within the boundaries of a project by quoting from two cases saying that when the injury is "wholly unrelated" to flood control, the statute does not apply.

The Tenth Circuit employed this rationale in *Boyd v. United States*, 881 F.2d 895, 899-900 (1989), to hold that §702c does not bar liability if the Corps of Engineers

should have excluded boats from a flood-control lake. A boat speeding through the lake struck and killed a snorkeler; this death, the court thought, had nothing to do with flood control. Fryman relies on *Boyd* and *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978), one of the cases the Court cited in note 7 of *James*. (We make nothing of the Court's citation to *Hayes*; the same footnote also cites *Morici Corp. v. United States*, 681 F.2d 645, 617-48 (9th Cir. 1982), which expressly rejects the holding of Hayes. It is unlikely that the Justices read these cases, and citing inconsistent holdings does not endorse either.) Just as some language in *James* is too broad, so *Boyd* has gone too far in the opposite direction. According to the Tenth Circuit, §702c does not apply at all to "liability associated with operating a recreational facility", 881 F.2d at 900. If that is so, then *James* was wrong on its own facts, for it grew out of recreational boating, and in *James* no less than in *Boyd* the deaths could have been prevented by closing the lakes to recreational boating.

If §702c has limits, they have to do with causation. In *Boyd* the court could have asked, not whether boating and snorkeling are "recreational", but whether the injury stemmed from features that differentiate flood-control lakes from purely recreational lakes. Boaters in *James* drowned because the imperatives of flood control led to the release of water from the lake. Collisions between swimmers and powerboats, by contrast, occur on natural lakes and purely recreational artificial lakes; none of the flood-control activities increased the probability of such a run-in.

Perhaps, however, an accident is "wholly unrelated" to flood control only when the existence of the project does not increase its probability. In that case, simple drownings are encompassed by §702c because, but for the

project, there would be no water, and but for water no one would swim and drown. Two courts of appeals have reached this conclusion. *McCarthy v. United States*, 850 F.2d 558, 562 (9th Cir. 1988) (diving accident) (unless the injury is "wholly unrelated" to the flood-control project, §702c applies); *Mocklin v. Orleans Levee District*, 877 F.2d 427, 430 & n.6 (5th Cir. 1989) (drowning; same rationale). Two others, although sympathetic to this approach, rely in addition on the fact that particular injuries were made more likely by the use of the lake in flood control. *DeWitt Bank & Trust Co. v. United States*, 878 F.2d 246 (8th Cir. 1989) (diving accident); *Dawson v. United States*, 894 F.2d 70 (3d Cir. 1990) (drowning). *James* did not adopt the "wholly unrelated" language from Morici; it only quoted it in a footnote. Courts assuming that these words are "the test" may be jumping the gun, and at all events wholly unrelated *to what*—the project, or the risk that led to the particular accident?—is an unsettled question.

Flood-control activities increase the probability of injuries such as Fryman's. Lake Shelbyville rises as flood waters enter in the spring and falls as water is released in the summer and fall to maintain constant rates of flow through the rivers downstream. During the spring and part of the summer, the island from which Dennis Fryman leapt is under water. After it emerges (in 1983, two weeks before the accident) its shoreline changes with the lake level. This makes it hard to identify places hazardous to divers; which spots are safe and which dangerous depends on the level of the lake. Constantly changing shorelines also are hard to plaster with signs. Unless the Corps of Engineers were to move the signs frequently, it would have to establish ranks of signs at different depths, which would appear as the lake fell. Signs themselves might be dangerous. The signs at higher elevations might need

to warn divers of other signs still beneath the waves. ("DANGER! Concealed Warning Signs!") Only preventing all visits to the island would solve the problem. Yet because "the problem" is attributable in substantial part to the nature of a flood-control project, a claim based on the theory that the Corps of Engineers should have closed the island to swimming in order to protect recreational users is the same in principle as the claim that the Corps should have closed to boaters the lakes in *James*.

Although the district court dismissed Fryman's case on the pleadings, there is no dispute that the water level of Lake Shelbyville is constantly changing, and that the island is indeed submerged for part of the year. Because Fryman concedes this (a concession his lawyer repeated at oral argument), and because a plaintiff may plead himself out of court, we affirm the judgment on this basis. We do not decide whether a recreational injury on a flood-control lake could be actionable under the FTCA when the flood-control activities did not increase the probability of the injury compared with a natural lake devoted to recreational use. Resolution of that question must wait until the answer makes a difference.

AFFIRMED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DENNIS FRYMAN,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	No. 86-2075
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

This matter is before the court on the United States' motion to dismiss the plaintiff's first amended complaint for lack of subject matter jurisdiction.

On August 7, 1983, the plaintiff, Dennis Fryman, was seriously injured when he dove into the water from the shoreline of an island in Lake Shelbyville in Moultrie County, in the Central District of Illinois. It is an uncontested fact that Lake Shelbyville is part of a flood control project for the Kaskaskia River Basin and that in addition to flood control, the lake provides recreational facilities for boating, fishing, swimming, and water skiing. The particular part of the lake in which the plaintiff was injured is known as the Wilborn Creek Recreation area and was designated as such by the United States. In this action, the plaintiff seeks to recover damages under the Federal Torts Claim Act, 28 U.S.C. § 2671. The defendant's motion calls into focus for the first time in the case the question whether the United States waived its sovereign immunity for tort actions arising in the Lake Shelbyville project.

The defendant filed the affidavit of Winston B. Campbell in support of its motion to dismiss. The plaintiff has moved to strike that affidavit for failure to comply with the provisions of Fed. R. Civ. P. 56(e). The court has read the affidavit and finds that its attachments do not violate the provisions of Rule 56(e). In any event, as will be discussed more fully in this order, the controlling fact for purposes of ruling on the government's motion is whether Lake Shelbyville is party of a flood control project and both sides agree that it is.

The controlling case is *United States v. James*, ____ U.S. ____, 54 U.S.L.W. 5030, 106 S. Ct. 3116 (1986). *James* was an action under the Federal Tort Claims Act for personal injuries as a result of federal government agents willfully and even maliciously failing to warn of a known danger in lakes operated by the government under the Flood Control Act, 33 U.S.C. § 702c. Section 702c provides: "No liability of any kind shall attach to or rest upon the United States for any damages from or by floods or flood waters at any place." The Court held that "Congress clearly sought to insure beyond doubt that sovereign immunity would protect the government from 'any' liability associated with flood control." 54 U.S.L.W. at 5034. "We therefore follow the plain language of § 702c, a section of the 1928 Act that received careful consideration by Congress and that has remained unchanged for nearly sixty years, and hold that the Federal Government is immune from suit in [flood control] cases." 54 U.S.L.W. at 5035. The Court rejected the arguments advanced by the plaintiffs that even if § 702c was intended to grant immunity in connection with flood control projects, the federal government was nevertheless subject to liability because the plaintiff's injuries arose from mismanagement of recreational facilities that were not related to flood con-

trol. The court concluded that management of the recreational facilities and failure to give proper warnings of dangers was management of a flood control project.

Subsequent to the *James* decision, the Ninth Circuit decided the case of *McCarthy v. United States*, 850 F.2d 558 (9th Cir. 1988). It is a case on all fours with the issues presented here. In *Murphy* [sic] a plaintiff was injured when he dove into the water at a point where it was about waist deep and struck his head on some object or the bottom of the lake. The Ninth Circuit concluded that it had no jurisdiction and that the United States had not waived its sovereign immunity against liability for injuries arising in connection with flood control projects, citing the *James* decision.

The plaintiff here argues that *McCarthy* is wrongly decided. The court does not agree. The court concludes that *McCarthy* is correctly decided and that the three district court cases subsequent to *James* that the plaintiff cites in support of its position are inapposite. In *Clay v. United States*, 647 F. Supp. 110 (S.D. Miss. 1986), the district court refused to apply *James* because the plaintiff had alleged that the flooding was done for a purpose other than flood control even though it was incidental to a flood control project. This court considers the *Clay* case wrongly decided. *See James*, 54 U.S.L.W. at 5034. In *Pueblo de Cochiti v. United States*, 647 F. Supp. 538 (D. N.M. 1986), the district court, again on a motion to dismiss for failure to state a claim, refused to dismiss because the court could not say the plaintiff was unable to prove some set of facts that would remove the plaintiff from the scope of § 702c. The district court again refused to follow *James* feeling that *James* did not decide the issue presented to it. This Court considers the *de Cochiti* case to be wrongly decided. *See James*, 54 U.S.L.W. 5034. In *Denham v.*

United States, 646 F. Supp. 1021 (W.D. Tx. 1986), a swimmer struck his head on an underwater object in a flood control reservoir. The court wrongly reaches the conclusion that the Supreme Court in *James* held the government was immune from liability because the damage was caused "by flood or flood waters" and that the holding in *James* was not applicable in the *Denham* case. This court concludes that *Denham* is a wrong reading of *James*. *See James*, 54 U.S.L.W. at 5034.

Accordingly, it is ordered that the motion of the United States to dismiss for lack of subject matter jurisdiction is allowed. The case is dismissed for lack of subject matter jurisdiction and the Clerk is directed to enter judgment in favor of the United States and against the plaintiff for lack of jurisdiction.

ENTER this 30th day of December, 1988.

/s/ Harold A. Baker
HAROLD A. BAKER
Chief U.S. District Judge

TITLE 33—NAVIGATION AND NAVIGABLE WATERS
CHAPTER 15. FLOOD CONTROL
33 U.S.C. § 702c (1980)

§ 702c. Expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights

Except when authorized by the Secretary of War [Secretary of the Army] upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War [Secretary of the Army] that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: Provided, however, That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected

to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War [Army] and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

(May 15, 1928, ch 569, § 3, 45 Stat. 535.)